

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-CV-00329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE’S RESPONSE IN OPPOSITION TO DEFENDANTS’
PROPOSED PROTECTIVE ORDER**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter “the State”) pursuant to leave of Court granted on May 17, 2006 at the hearing held before Magistrate Judge Joyner and hereby respectfully submits the following in opposition to the Proposed Protective Order submitted by counsel for all Defendants (collectively “Defendants”), and seen by the State for the first time, at close of Tyson’s argument at the hearing. For the reasons set forth below, and in the State’s Response in Opposition to Defendants’ Motion for Protective Order filed at docket entry 570, the Court should find that no protective order is required and decline to adopt the Defendants’ Proposed Protective Order. The Court should, instead, craft an order addressing the few remaining issues on which the parties have not agreed as set forth in the “Comparison of Parties Biosecurity Protocol Sampling Requirements” (hereinafter “the Comparison”) presented by the State at the hearing and attached hereto, labeled as Exhibit “A”.

The Proposed Protective Order presented by Defendants is overly broad, contrary to the Rules of Civil Procedure, outside the parameters of the subpoenas at issue, and contrary to the prior agreements on certain testing and sampling issues reached by the parties. During the hearing, the Court extensively examined and discussed the Comparison presented by the State. The Court heard testimony from counsel for Plaintiff, Defendants, and the Poultry Growers regarding the methods and protocols to be followed when samples are taken of the subpoenaed premises. As was made clear to the Court, and evidenced in the Comparison, the parties have agreed upon extensive restrictions in the method and manner in which the samples will be obtained. The State agreed at the hearing to sample the Cobb-Vantress properties first to avoid any potential issue arising from the stricter seven day regulation regarding timing of visits. Additionally, the State agreed to amend item number three in the Comparison from 48 hours to allow 72 hours before visits to a Tyson grower following visits to other Defendants' growers which require only a 48 hour separation. Defendants now seek to further restrict and, in essence, direct the State's discovery procedure by introducing a Proposed Protective Order which exceeds the bounds of the already agreed to procedures.

As reflected in the Comparison at item number seven, the parties previously agreed a 72-hour notice time would be given by the State to Defendants in events of routine non-storm related sampling.¹ Defendants' unilaterally submitted Proposed Protective Order extends that notice time to "a minimum of 5 working days". Also the

¹ Procedures suggested in item number eighteen must be incorporated into all notice requirements to avoid disputes and to document compliance. The Court's order should provide that it is incumbent upon each party and subpoenaed party to designate a person to receive notice when made and that failure by a noticed party to appear at the designated rendezvous point and/or to appear at the sampling premises prior to the designated and noticed time for sampling, will not prevent the State from proceeding with sampling of the premises.

Comparison, at item number eight, provides that Defendants will be given a minimum of three hours notice time for storm-related sampling.² Defendants' unilateral Proposed Protective Order extends this to a five hour notice time. The Comparison provides, in item number five, that Plaintiff will provide Defendants with the sampling protocols and work plan a minimum of 96 hours (4 days) prior to the first sampling event. Tyson's proposed order extends this provision to fourteen days.

Additionally, Defendants' proposed order exceeds the bounds of the Federal Rules of Civil Procedure by mandating that any sample taken under subpoena by Plaintiff without "the notice proscribed [sic] herein or without providing for the participation of the Defendants or subpoenaed party shall not be admissible or useable by any expert in forming an expert opinion." This proposed provision is contrary to the applicable rules of civil procedure, is unwarranted and should not be included in an order fashioned by the Court.

Defendants' proposed order also goes outside the scope of the subpoenas in proposing in paragraph two that Defendants and their consultants accompany the State's sampling teams during "all sampling activities", even those in locations other than the subpoenaed Grower's lands.

The Defendants' Proposed Protective Order also fails to discuss the representation made in Court at the hearing that Defendants would work with the State to provide access to poultry houses when the chickens were not present. This issue is included in the Comparison at item number seventeen. The State respectfully requests that the Court

² By letter dated April 27, 2006 and attached as part of Exhibit 2 to Tyson Chicken, Inc.'s Objection and Motion to Quash (docket entry 545), Scott McDaniel outlines the Defendants' expectations with respect to the sampling and testing issues. These expectations are consistent with the Comparison submitted to the Court at the hearing, including the three hour notification procedure.

include in its order a provision requiring the Defendants to provide reasonable notice of the scheduling of removal of flocks from the poultry houses and of any subsequent caking or clean out to be performed in the poultry houses to allow sufficient opportunity for the State to gather the required samples from inside the barns while flocks are absent. No other single measure will do more to eliminate any perceived risk to the Defendants' flocks.

Tyson's Proposed Protective Order is contrary to prior agreements, to what was presented in Court and is unnecessary, in any event. The State requests that the Court craft an order adopting the agreed to provisions set forth in the Comparison and resolving the few remaining contested matters which will sufficiently ensure to all parties that proper biosecurity protocols are adhered to and proper notice is given of testing and sampling to be performed under the subpoenas.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2006, I electronically transmitted the attached document to the following:

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